

1 NICHOLAS MARCHI
2 Carney & Marchi, P.S.
3 7502 West Deschutes Place
Kennewick WA 99336
(509) 545-1055
4 Attorneys for Defendant
NICHOLAS SEAN CARTER

5
6 UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Plaintiff,

Case No. 2:20-CR-00005-SMJ-2
2:19-CR-00183-SMJ-1
4:19-CR-06063-SMJ-2

9 vs.
10 NICHOLAS SEAN CARTER,
11 Defendant

MOTION TO REOPEN DETENTION
HEARING AND MODIFY DETENTION
ORDER AND ATTACHED MEMORANDUM
OF LAW

12 Note: 5/26/2020 at 2:30 pm
13 Before Magistrate Judge Dimke via video
hearing at Richland

14 **MOTION**

15 COMES NOW the defendant, NICHOLAS SEAN CARTER, by and through his
16 attorneys, CARNEY & MARCHI, and requests this Court reopen the Detention Hearing held on
17 January 28, 2020. At the time of the hearing, on January 28, 2020, the Defendant waived
18 hearing and a detention order was entered on all cases. Defendant reserved the right to reopen
19 the Detention Hearing. Mr. Carter has now located a residence and would request that Court
20 reopen the Detention Hearing. This motion is made pursuant to 18 U.S. C. §3145 and based on
21 information, which did not exist at the time of the hearing. This motion is based on the attached
22 memorandum of law.

23
24 DATED this 19th day of May 2020.

25
s/Nicholas Marchi
Nicholas Marchi, WSBA 19982

1 CARNEY & MARCHI

2 MEMORANDUM OF LAW

3 **A. Facts**

4 Mr. Carter is charged by Indictment in Cause 2:20-CR-00005 three counts of Possession
5 with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C.
6 §841(a)(1)(b)(1)(B)(viii); and one count of Felon in Possession of a Firearm in violation of 18
7 U.S.C. §922(g). He is charged in Cause 2:19-CR-00183-SMJ-1 with two counts of Possession
8 with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C.
9 U.S.C. §841(a)(1)(b)(1)(B)(viii). His charged in cause no 19-CR-06063-SMJ-2 with Intent to
10 Distribute a Controlled Substance, in violation of 21 U.S.C. §841(a)(1)(b)(1)(B)(viii); one count
11 of Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C.
12 §924(c); and one count of Felon in Possession of a Ammunition in violation of 18 U.S.C.
13 §922(g).

14 At his last hearing, Mr. Carter accepted a Detention Order but reserved his right to renew
15 his request as he need additional information to seek a residence to be released. Mr. Carter has
16 now located a residence. He further raises this request based on the effects of the COVID-19
17 virus on the jail population and the fact that his hearing on all three of these matters will most
18 likely be delayed due to the virus.

19 **B. Argument.**

20 The defendant is requesting that this Court set conditions of release which will assure his
21 appearance at all future proceedings pursuant to 18 U.S.C. Sect. 3141 et seq. Mr. Carter does not
22 pose a flight risk. If he were released, he would seek treatment and employment and comply with
23 all conditions of his release. A review of his Franklin County matter that preceded this matter
24

1 and was the basis for one of the federal cases, shows he appeared for all hearing. Thus he is not
 2 a flight risk.

3 18 U.S.C § 3141 favors pretrial release over detention, it offers the court several choices
 4 in setting conditions of release. The court can release on personal recognizance; release on
 5 conditions; or order detention. The government must show that the defendant is a danger to the
 6 community or that he poses a flight risk. 18 U.S.C § 3142(e)-(g) The court considers these
 7 options based on a number of factors including the background of the defendant, his criminal
 8 history the nature of the charges and the least important factor the weight of the evidence. *United*
 9 *States v. Motanedi*, 767 F.2d 1403 (9th Cir. 1986) The government must show that there are no
 10 conditions of release that alleviate the risks as noted in the statute. *United States v. Windsor*,
 11 785 F.755 (9th Cir. 1986)

13 The United States Supreme Court has indicated that the Eighth Amendment may not
 14 allow detention based on flight. The Court stated: "when the government has admitted that its
 15 only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that
 16 goal and no more." *United States v. Salerno*, 481 U.S. 739, 753 (1987) (citing to *Stack v. Boyle*,
 17 342 U.S. 1 (1951)

18 Finally, when a defendant moves for release on bail following pretrial detention, the court
 19 must consider three factors: "(1) the length of the pretrial detention; (2) the extent to which the
 20 prosecution is responsible for the delay of the trial; and (3) the strength of the evidence upon
 21 which the pretrial detention was based." *United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir.
 22 1993)

24 In support of this request, Mr. Carter maintains that he is not a flight risk and does not
 25 pose a threat to the community and thus this Court can set conditions of release.

1 Finally, Mr. Carter would request that this Court set conditions of release based on the
 2 current health crisis confronting the Courts and correctional institutions.

3 COVID-19 is highly contagious and may be spread by asymptomatic individuals. It has
 4 no known vaccination or cure and has killed thousands. As of March 16, 2020, the new strain of
 5 coronavirus, which causes COVID-19, has infected over 181,904 people, leading to at least
 6 7,139 deaths worldwide.¹ On March 11, 2020, the World Health Organization officially
 7 classified COVID-19 as a pandemic.² The first case of COVID-19 in the United States was
 8 found in Snohomish County, Washington. The first death presumed to be from COVID-19 was
 9 also in the Seattle area – in Kirkland, Washington.

10 COVID-19 is an extremely dangerous disease. The best estimate for its overall fatality
 11 rate—i.e., its fatality rate among all demographics—is 0.3-3.5%, “which is 5-35 times the
 12 fatality associated with influenza infection.” Beyrer Dec. ¶ 5;³ see also Nick Wilson et al., *Case-
 13 Fatality Risk Estimates for COVID-19 Calculated by Using a Lag Time for Fatality*, 26(6) EID
 14 Journal (prepublication June 2020).⁴ Fatality rates vary wildly, however, depending on both
 15 environmental and demographic risk factors.

16 The death rate for those deemed at-risk is even higher. It increases rapidly with age. Across
 17 all age groups, COVID-19 kills:

18

- 19 • 13.2% of people with cardiovascular disease
- 20 • 9.2% of people with diabetes

21 ¹ <https://www.worldometers.info/coronavirus/coronavirus-cases> (updating regularly).

22 ² *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020) at
 23 <https://bit.ly/2W8dwps>.

24 ³ Declaration of Chris Beyrer, MD, MPH, Professor of Epidemiology, Johns Hopkins Bloomberg School
 25 of Public Health, attached as Exhibit B.

⁴ Available at https://wwwnc.cdc.gov/eid/article/26/6/20-0320_article.

- 1 • 8.4% of people with hypertension
- 2 • 8% of people with chronic respiratory disease
- 3 • 7.6% of people with cancer⁵

4 According to the CDC, the virus is mainly spread person-to-person “[b]etween people who
 5 are in close contact with one another (within about 6 feet)” and “[t]hrough respiratory droplets
 6 produced when an infected person coughs or sneezes.”⁶ The spread can be slowed, public health
 7 professionals say, if people practice “social distancing” by avoiding public spaces and generally
 8 limit their movement. “Social distancing” is not an option at the Benton County Jail. Like most
 9 correctional institutions, inmates housed at the Benton County Jail are in close quarters and
 10 forced to share bathrooms, laundry, and meal areas. The cell toilets rarely have lids and the tank
 11 often doubles as the sink for handwashing. Air circulation is uniformly poor. Infections that are
 12 transmitted through droplets, like influenza and SARS-nCoV-2 virus, are particularly difficult to
 13 control in detention facilities. These deficiencies now represent a threat not only to those being
 14 housed there but to the community at large.

15 Detaining Mr. Carter poses significant health risk to him, given the likelihood that
 16 COVID-19 will spread within the correctional facility that he is housed. The risk is not limited
 17 to him. The courts have long recognized that there is no greater necessity than keeping a
 18 defendant alive, no matter the charge. As former Federal District Court Judge Weinstein for the
 19 Eastern District of New York stated: “We do not punish those who have not been proven guilty.”

20 *United States v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing

23 ⁵ World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019*
 24 (COVID-19) at 12 (Feb. 28, 2020), at <https://www.who.int/docs/default-source/coronavirus/who-china-joint-mission-on-covid-19-final-report.pdf>.

25 ⁶ *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html> (last accessed on March 13, 2020).

1 murder charges released on bail because of the “unacceptably high risk of infection and death on
 2 a daily basis inside the MCC”).

3 The United States Constitution affords pretrial detainees greater protection from
 4 dangerous conditions of confinement than those sentenced after conviction. *See, e.g., Hernandez*
 5 *v. County of Monterey*, 110 F. Supp. 3d 929, 934 (N.D. Cal. 2015) (“A jail violates both [the
 6 Fourteenth and Eight Amendments] if it incarcerates inmates under conditions posing a
 7 substantial risk of serious harm to their health or safety . . . and if [government] acted with
 8 deliberate indifference, that is, with conscious disregard for that risk[.]”); *Morales Feliciano v.
 9 Rossello Gonzalez*, 13 F. Supp. 2d 151, 210 (D.P.R. 1998) (“The failure to screen incoming
 10 [inmates] for infectious diseases including tuberculosis” violates the Constitution).

11 This Court should consider the “total harm and benefits to prisoner and society” that
 12 detention of Mr. Carter will yield, relative to the heightened health risks posed to him, and that
 13 posed to the other inmates, court and BOP staff, and the community during this rapidly
 14 encroaching pandemic. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J.,
 15 concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison
 16 conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004)
 17 (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind
 18 and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”).

19
 20 **C. Conclusion.**

21 Clearly, release is warranted and is appropriate in this matter. Mr. Carter would ask for
 22 release on conditions that the Court determines are appropriate and that would ensure his
 23 attendance at further proceedings.

1 DATED this 19th day of May 2020.
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4 Respectfully Submitted,
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7 S/ *Nicholas Marchi*
8 Nicholas Marchi, WSBA 19982
9 CARNEY & MARCHI
10 Attorneys for Defendant

11 **CERTIFICATE OF SERVICE**
12

13 I certify that a copy of the Motion to Re-Open Detention Hearing was e-mailed via ECF
14 on 5/21/2020, to S. Van Marter, Assistant United States Attorney, 402 E. Yakima, Suite 210,
15 Yakima, WA 98901.
16

17 S/ *Nicholas Marchi*
18 CARNEY & MARCHI, P.S.
19 Attorneys for Defendant
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